

2010

Bud Bailey Construction, Inc. v. Cache Valley Bank : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BUD BAILEY CONSTRUCTION, INC.,

**Cross-Claimant and Third Party
Plaintiff and Appellee,**

vs.

**CONSTRUCTION ASSOCIATES, INC.,
separately and dba as KRT DRYWALL,**

Cross-claim Defendant,

WILLIAM KIM PITCHER,

Third Party Defendant,

CACHE VALLEY BANK,

Garnishee and Appellant.

DOCKET NO. 20100463

**Second District Court
Case No. 050700267**

OPENING BRIEF OF APPELLEE

**APPEAL FROM THE FINAL ORDERS OF THE SECOND DISTRICT COURT,
DAVIS COUNTY, UTAH – THE HONORABLE JON M. MEMMOTT**

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**FILED
UTAH APPELLATE COURTS**

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JURISDICTION

Pursuant to Utah Code § 78A-4-103, the Utah Court of Appeals has jurisdiction.

STANDARD OF REVIEW

As to factual findings, upon appeal from a contempt citation, contemnor has burden of demonstrating that, viewed in the light most favorable to the trial court, the evidence at trial was insufficient to support the trial court's findings.¹

As to legal conclusions and rules of procedures, errors are questions of law which the Court of Appeals may review for correctness.²

DETERMINATIVE STATUTORY PROVISIONS

I. Utah Rules of Civil Procedure – Rule 64D(e)(4) Interrogatories.

The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring: ...whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted.

II. Utah Rules of Civil Procedure – Rule 64D(g) Garnishee's responsibilities.

The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee: (g)(1) answer the interrogatories under oath or affirmation; (g)(2) serve the answers on the plaintiff;

¹ *Utah Farm Production Credit Ass'n v. Labrum*, 762 P.2d 1070 (Utah 1988).

² *Brown v. Glover*, 16 P.3d 540, 544 (Utah 2000); *N.A.R., Inc. v. Walker*, 37 P.3d 1068, 1069 (Utah App. 2001).

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property; and (g)(4) file the answers with the clerk of the court. The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving and filing the amended answers in the same manner as the original answers.

III. Utah Rules of Civil Procedure – Rule 64D(j)(2) Liability of garnishee.

If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

IV. Utah Rules of Appellate Procedure – Rule 24(a)(9)

...A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set for the legal basis for such an award.

STATEMENT

I. NATURE OF THE CASE.

This case is a legal dispute over improperly asserted bank offset rights, failure to comply with Rule 64D of the Utah Rules of Civil Procedure and penalties for failure to comply with a District Court order. This matter deals with the efforts of Bud Bailey Construction, the judgment creditor and Bud Bailey herein, to garnish the bank deposit account of Construction Associates, Inc. dba KRT Drywall, the judgment debtor; the repeated failure by Cache Valley Bank, the bank where the deposit account of the judgment debtor was located and Cache Valley herein, to comply with a garnishment order of the District Court; and the award granted to Bud Bailey by the District Court for the bank's failure to comply with a valid garnishment order.

II. COURSE OF PROCEEDINGS BELOW.

On November 1, 2006, and following the District Court's entry of judgment against Third-Party Defendant Construction Associates, Inc. dba KRT Drywall, Bud Bailey Construction, Inc. ("Bud Bailey") served Cache Valley Bank ("Cache Valley") with a writ of garnishment to obtain funds that Cache Valley held on behalf of Construction Associates, Inc. At the time, Cache Valley held \$17,901.94 in Construction Associates' checking account.

Subsequently, Cache Valley responded to the writ and the included interrogatories. However, in its response, Cache Valley left blank the interrogatory section regarding deductions for money owed to it by Construction

Associates, thereby creating the impression that Cache Valley was not claiming an offset. Nevertheless, despite its response, Cache Valley applied the \$17,901.94 that it held to the balance of an outstanding Construction Associates loan.

Thereafter, on January 29, 2007, Bud Bailey filed a motion for order to show cause regarding Cache Valley's interrogatory responses and its failure to remit to Bud Bailey the identified \$17,901.94 in Construction Associates' funds. On May 9, 2007, following briefing and three (3) separate evidentiary hearings on the matter in which Cache Valley simply failed to submit any evidence to support its arguments, the District Court issued an order finding Cache Valley in contempt for its failure to adequately respond to the garnishment interrogatories in compliance with Rule 64D of the Utah Rules of Civil Procedure. Accordingly, the District Court entered judgment in favor of Bud Bailey and against Cache Valley in the amount of \$41,049.11, representing the remaining sum on Bud Bailey's garnishment, \$38,769.71, plus attorneys' fees in the amount of \$2,279.40.

On June 8, 2007, Cache Valley filed a notice of appeal regarding the District Court's May 9, 2007 order and the judgment entered against it. On December 4, 2008, the Utah Court of Appeals issued an opinion, which reversed and remanded the matter back to the District Court. Specifically, the Court of Appeals found that the District Court "erred when it considered the subsequent account activity" of Cache Valley and Construction Associates following the

service of Bud Bailey's writ of garnishment. The Court of Appeals also noted that, "rule 64D limits the amount that can be awarded to Bud Bailey to the balance of the amount of property held by [Cache Valley] at the time the Writ was served, \$17,901.94, or the amount of the judgment remaining unpaid, \$38,769.71, 'whichever is less,' Utah R. Civ. P. 64D(j)(2)." Therefore, the Court of Appeals directed the District Court on remand to determine the just amount, within this limitation, that Cache Valley's should be assessed for its failure to adequately respond to Bud Bailey's garnishment interrogatories.

Following the issuance of the Court of Appeals' opinion, the District Court held a telephone conference with the parties and requested supplemental briefing on the remand issue. On October 28, 2009, Bud Bailey filed its supplemental brief, which relied primarily on the arguments within its pleadings filed prior to Cache Valley's appeal. Bud Bailey also noted that Cache Valley did not dispute that it had failed to properly answer the garnishment interrogatory regarding offsets, which Cache Valley had failed to provide adequate justification for its incomplete interrogatory response and asserted that based upon this failure Bud Bailey was denied the priority of its judgment against Construction Associates. Accordingly, Bud Bailey argued that the District Court should assess a judgment against Cache Valley for the full \$17,901.94 that it held for Construction Associates at the time of the writ of garnishment was served, plus reasonable attorneys' fees and costs.

On December 1, 2009, Cache Valley filed its supplemental brief on the remand issue. In its supplemental brief, Cache Valley argued that because service of Bud Bailey's writ of garnishment was not upon its registered agent, Cache Valley should not be assessed any amount for its failure to properly respond to the garnishment interrogatories. Cache Valley also argued that because its offset would have been proper but for its incomplete interrogatory response, equity does not favor a finding of contempt on the part of Cache Valley.

On January 20, 2010, the District Court held a hearing on the remand issue. At the hearing, the parties' reasserted their prior arguments and the District Court took the matter under advisement.

On March 8, 2010, the District Court issued its ruling on the remand issue.

III. DISPOSITION OF THE REMAND ISSUE BY DISTRICT COURT.

The District Court in its ruling on the remand issue held "that the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey's garnishment interrogatories is the full amount that Cache Valley held for Construction Associates at the time the writ of garnishment was served, \$17,901.94, plus Bud Bailey's reasonable costs and attorneys' fees, which shall be proven through subsequent affidavit of counsel."

Importantly, the District Court noted at footnote 2 of the ruling on the remand issue that "the issue before it [the District Court] is not whether Cache Valley's actions were contemptuous, as Cache Valley argues, but rather what is

the just amount to assess against Cache Valley for its failure to properly respond to the garnishment interrogatories.”

The District Court based this conclusion on its findings that (1) Cache Valley received and accepted service of Bud Bailey’s writ of garnishment; (2) the Court of Appeals found Cache Valley had conceded that it waived any defense for improper service; (3) that Cache Valley incorrectly argued on remand that the issue of its contempt remains in dispute, despite the holding of the Court of Appeals that Cache Valley did not have priority over Bud Bailey’s garnishment but rather acknowledged that Cache Bank did not contest that it failed to assert an offset in response to Bud Bailey’s garnishment interrogatories; and (4) that Cache Valley failed to provide adequate justification or evidence for its failure to properly respond to Bud Bailey garnishment.

Importantly, the District Court noted at footnote 6 of the ruling on the remand issue that it [District Court] had afforded Cache Valley the opportunity to submit evidence to support its arguments on multiple occasions, to wit: in the initial proceedings prior to Cache Valley’s appeal; when requiring supplemental briefing on the remand issue; during the January 20, 2010 hearing on the issue; and subsequent to the hearing by leaving the decision to submit additional supplemental evidence open at the hearing – nevertheless, Cache Valley has simply failed to submit evidence to support its arguments.

STATEMENT OF FACTS

1. On August 9, 2005, the District Court entered default judgment in the amount of \$46,919.79 against Construction Associates, Inc. dba KRT Drywall (“judgment debtor” or “Construction Assoc.”) in favor of Bud Bailey.³
2. On October 19, 2006, Bud Bailey filed with the District Court an application for writ of garnishment in the judgment amount of \$46,919.79 (with \$38,769.71 still owing).⁴
3. On October 19, 2006, the District Court issued a writ of garnishment to Cache Valley in the judgment amount of \$46,919.79 with \$38,769.71 still unpaid.⁵
4. On November 1, 2006, Cache Valley was served with the writ of garnishment.⁶
5. On November 8, 2006, Cache Valley filed with the District Court garnishee’s answers to interrogatories for property and other earnings. In its answers to interrogatories Cache Valley acknowledged \$17,901.94 being present from the account of the judgment debtor. In response to interrogatory three Cache Valley claimed no offsets or deductions.⁷
6. On January 25, 2007, the District Court issued a Garnishee Order to Show Cause in re contempt ordering Cache Valley to appear before the district court on February 12, 2007 at 2:00 p.m. to show cause: 1) why Cache Valley should not

³ See Default Judgment, R.72-74.

⁴ See Application for Writ of Garnishment, R.98-100.

⁵ *Id.*

⁶ See Constable’s Proof of Service, R.105.

⁷ See Garnishee’s Answers to Interrogatories, R.101-104.

be ordered to appear before the District Court to explain its failure to obey the order of the district court; 2) why Cache Valley should not be held in contempt for its failure to release the amount garnished; 3) why Cache Valley should not be ordered to pay the amount that has been garnished from the judgment debtor's account; 4) why Bud Bailey should not be awarded its attorneys fees and costs for having to bring this order to show cause; and 5) why Bud Bailey should not be awarded such further relief as the District Court deems just and equitable under the circumstances.⁸

7. On February 12, 2007, the District Court heard arguments on the order to show cause in re contempt. Cache Valley failed to appear and was contacted by the District Court via phone. The District Court set an additional hearing for February 26, 2007. The District Court granted attorney fees to Bud Bailey.⁹

8. On February 26, 2007, the day of the hearing, Cache Valley filed with the District Court a response to garnishment and order to show cause in re contempt.¹⁰

9. On February 26, 2007, the District Court again heard arguments on the order to show cause in re contempt. At the hearing, Cache Valley again failed to submit evidence to support its arguments and requested an additional evidentiary hearing to provide evidence to the District Court. The District Court granted

⁸ See Motion for Order to Show Cause in re Contempt, R.120-121.

⁹ See Minutes from Hearing, R.133-134.

¹⁰ See Response to Garnishment, R.135-158.

Cache Valley's request and set a third hearing for April 2, 2007. The District Court again granted attorney fees to Bud Bailey.¹¹

10. On March 13, 2007, Cache Valley filed with the District Court a supplemental memorandum in support of its response to garnishment and order to show cause in re contempt. In the supplemental memorandum, Cache Valley asserted that after it had answered the writ and remitted the [first] garnishment amount, the bank exercised the remedy to offset amounts owed to the bank by commencing a de-facto receivership to monitor and control the bank accounts of the judgment debtor.¹²

11. On March 13, 2007, in support of its supplemental memorandum, Cache Valley filed with the District Court an affidavit of garnishee. In the affidavit of the bank president, Cache Valley asserted it had disregarded the order of the District Court, by exercising the remedy to offset amounts owed to the bank by "more or less operating a de-facto receivership."¹³

12. On March 27, 2007, Bud Bailey filed with the District Court its reply memorandum in opposition.¹⁴

13. On April 2, 2007, Cache Valley filed with the District Court a further supplemental exhibit for supplemental memorandum in support of its response to

¹¹ See Minutes of Hearing, R.159-160.

¹² See Supplemental Memorandum, R.161-170.

¹³ See Affidavit of Garnishee, R.171-180.

¹⁴ See Reply Memorandum, R.181-201.

garnishment and order to show cause in re contempt, in an attempt to show its rights to offset.¹⁵

14. On April 2, 2007, the District Court held a third hearing on the order to show cause in re contempt. In the hearing Cache Valley again failed to submit any evidence to support its arguments and requested yet again another hearing to provide additional evidence of its right to disregard the order of the District Court under a power of de-facto receivership. The District Court denied the request for a fourth hearing and ordered Bud Bailey to prepare the findings of fact and the order. The District Court again granted attorney fees to Bud Bailey.¹⁶

15. On June 8, 2007, Cache Valley filed a notice of appeal regarding the District Courts May 9, 2007 order and the judgment entered against it.¹⁷

16. On December 4, 2008, the Utah Court of Appeals issued an opinion, which reversed and remand to the District Court the matter of the amount to be assessed against Cache Valley.¹⁸

17. On January 20, 2010, the District Court held a hearing on the remand issue. In the hearing Cache Valley again failed to submit any evidence to support its arguments.¹⁹

¹⁵ See Supplemental Exhibit, R.202-232.

¹⁶ See Minutes of Hearing, R.233.

¹⁷ See Notice of Appeal, R.244-257.

¹⁸ See Opinion of Court of Appeals, R.279-284 a copy attached as Fourth Addendum.

¹⁹ See Ruling on Remand Issue, R.328 a copy attached as First Addendum.

18. On March 8, 2010, the District Court issued its ruling on the remand issue.²⁰

SUMMARY OF ARGUMENT

The District Court properly found based on the directives on remand from the Utah Court of Appeals, “that the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey’s garnishment interrogatories is the full amount that Cache Valley held for Construction Associates at the time the writ of garnishment was served, \$17,901.94, plus Bud Bailey’s reasonable costs and attorneys’ fees.”²¹ It was later proven through subsequent affidavit of counsel that the reasonable costs and attorneys’ fees to assess against Cache Valley was \$8,500.70, as ordered by the District Court on April 27, 2010.²²

The District Court’s decision on remand should be upheld for the simple reason that through the course of multiple occasions, Cache Valley has never provided any evidence to support its arguments. Simply put, it strains all reason for Cache Valley to argue before this Court that there was an error by the District Court on the issue for remand when it couldn’t even provide evidence to support its arguments.

²⁰ See Ruling on Remand Issue, R.325-333 a copy attached as First Addendum.

²¹ See Ruling on Remand Issue, R.325-333 a copy attached as First Addendum.

²² See Order, R.349-352 a copy attached as Second Addendum.

ARGUMENT

I. DURING THE COURSE OF THIS MATTER, CACHE VALLEY HAS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT ITS ARGUMENTS.

In the ruling on remand issue, the District Court noted an important and key factor which resulted in its initial ruling and judgment against Cache Valley, together with its ruling on remand. The District Court stated:

“The Court notes that it has afforded Cache Valley the opportunity to submit evidence to supports its arguments on multiple occasions, to wit: in the initial proceedings prior to Cache Valley’s appeal; when requiring supplemental briefing on the remand issue; during the January 20, 2010 hearing on the issue; and subsequent to the hearing by leaving the decision to submit additional supplemental evidence open at the hearing. Nevertheless, Cache Valley has simply failed to submit evidence to support its arguments.”²³

The statement by the District Court is an accurate representation of the entire matter.

When the District Court heard arguments on the order to show cause in re contempt for the first time, Cache Valley failed to appear. When the District Court reconvened to hear arguments again, Cache Valley failed to submit evidence to support its arguments and requested an additional evidentiary hearing to provide evidence to the District Court.

When the District Court reconvened to hear arguments for the third time, Cache Valley was unable to find any evidence to support its previous arguments put forth a new argument that it exercised the remedy to offset amounts owed to

²³ See Ruling on Remand Issue, footnote 6, R.325-333 a copy attached as First Addendum.

Cache Valley by “more or less operating a de-facto receivership to monitor and control the bank accounts of Construction Associates, Inc.”²⁴ but again failed to submit any evidence to support its arguments. The District Court thereafter entered judgment against Cache Valley.

Later, when the District Court heard arguments on the remand issue, Cache Valley either put forth arguments which were not on remand (i.e., its contempt, service of the writ, etc.) or again failed to submit evidence to support its arguments.

Appropriately, based upon the evidence and arguments presented in this matter, the District Court found that Cache Valley had not provided an adequate justification for its failure to properly respond to Bud Bailey’s garnishment interrogatories. The District Court held that Bud Bailey was not provided notice of the offset claimed by Cache Valley as required by Rule 64D of the Utah Rules of Civil Procedure.²⁵ Therefore, the District Court properly found that the just amount to assess against Cache Valley for its failure was the full amount that it held for Construction Associates at the time Bud Bailey served its writ of garnishment was \$17,901.94, plus interest and Bud Bailey’s reasonable costs and attorneys’ fees.²⁶

²⁴ See Affidavit of Garnishee, R.171-180; Minutes of Hearing, R.233.

²⁵ See *Colonial Building Supply, LLC v. Const. Assoc., Inc.*, 198 P.3d 1017 at 1018 (Utah Ct. App. 2008), a copy attached as Fourth Addendum.

²⁶ See Utah R. Civ. R. 64(D)(g) & (j); Ruling on Remand, R.332 a copy attached as First Addendum.

The ruling of the District Court was reasoned and proper. Accordingly, the District Court's ruling on remand should be affirmed.

II. THE DISTRICT COURT PROPERLY ADDRESSED THE ONLY ISSUE ON REMAND – A DETERMINATION OF WHAT AMOUNT CACHE VALLEY SHOULD BE REQUIRED TO PAY FOR ITS FAILURE TO ANSWER ADEQUATELY THE INTERROGATORY SERVED WITH THE WRIT.

In the ruling on remand issue, the District Court properly ruled upon the only issue remanded to it by the Court of Appeals – the amount the Bank should be required to pay solely for its failure to answer adequately the interrogatory served with the writ.²⁷ The ruling of the District Court on remand is instructive on this point:

“Here, it is undisputed that Cache Valley held \$17,901.94 in a checking account for Construction Associates at the time Bud Bailey served its writ of garnishment. It is also undisputed that Cache Valley failed to properly respond to Bud Bailey's garnishment interrogatories by leaving blank the interrogatory section regarding Cache Valley's offsets for amounts owed to it by Construction Associates, which violates Rule 64D of the Utah Rules of Civil Procedure. In its May 9, 2009 order finding Cache Valley in contempt for this failure, this Court entered judgment against Cache Valley in an amount that exceeded that which is authorized by Rule 64D and Utah appellate precedent. [citations omitted]. Accordingly, the Utah Court of Appeals remanded this matter back to this Court to determine the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey's garnishment interrogatories, not to exceed \$17,901.94, plus reasonable costs and attorneys' fees.”²⁸ ... On remand, Cache Valley has again failed to provide any adequate justification for its failure to properly respond to Bud Bailey's garnishment interrogatory regarding its offsets.²⁹

²⁷ See *Colonial Building Supply, LLC v. Const. Assoc., Inc.*, 198 P.3d 1017 at 1019-20 (Utah Ct. App. 2008), a copy attached as Fourth Addendum.

²⁸ See Ruling on Remand Issue, R.330 a copy attached as First Addendum.

²⁹ See Ruling on Remand Issue, R.331 a copy attached as First Addendum.

The District Court further clarified itself in footnote 4 of the ruling by stating that:

“...the Court based its finding of contempt on the fact that Cache Valley had failed to properly respond to Bud Bailey’s garnishment interrogatories in conformance with Rule 64D of the Utah Rules of Civil Procedure and, therefore, did not provide notice to Bud Bailey of its claimed offset against Construction Associates. Cache Valley failed to provide an adequate justification for its incomplete interrogatory response, and accordingly, this Court determined ... that the just amount to assess against Cache Valley is the most severe penalty authorized under Utah law.³⁰

In fact, the only support for its arguments that Cache Valley put forth on remand was that the District Court misunderstood the Court of Appeals decision and remand instructions. Not surprisingly, that is the only support for that argument before this Court. Contrary to Cache Valley’s contentions, the arguments of counsel are not sufficient justification for its failure to properly respond to Bud Bailey’s garnishment interrogatory regarding its offsets.³¹

³⁰ See Ruling on Remand Issue, footnote 4, R. 330-331 a copy attached as First Addendum.

³¹ The District Court notes in footnote 2 of the ruling on demand that “Cache Valley incorrectly argues that the issue of its contempt remains in dispute. Indeed, Cache Valley’s supplemental brief incorrectly states that the Utah Court of Appeals found that Cache Valley’s offset would have had priority over Bud Bailey’s garnishment. However, the Court of Appeals’ opinion makes no such finding regarding Cache Valley’s priority and acknowledges that Cache Valley did not contest that it failed to assert an offset in response to Bud Bailey’s garnishment interrogatories. See Const. Assoc., Inc., 198 P.3d 1017.

Garnishment allows a judgment creditor to satisfy a judgment by reaching property owed to the judgment debtor by a third party.”³² Generally, the garnishee is “a neutral party to the garnishment proceedings, such as a bank, and merely holds the subject property until a court establishes whether the judgment creditor is entitled to it.”³³ “However, sometimes a garnishee departs from a neutral position to assert its own claim to the property, which may be proper.”³⁴ Indeed, “[a] garnishee who acts in accordance with [Rule 64D of the Utah Rules of Civil Procedure], the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.”³⁵

In this matter it is undisputed that Cache Valley failed to provide an adequate justification for its incomplete interrogatory response and, accordingly the District Court determined that it was appropriate and just under the circumstances to assess against Cache Valley the penalty authorized by Utah law. That penalty as set forth in the ruling on remand was “the full amount that Cache Valley held for Construction Associates at the time the writ of garnishment was served, \$17,901.94, plus interest and Bud Bailey’s reasonable costs and attorneys’ fees.

³² *Whitney v. Faulkner*, 95 P.3d 270, 274 (Utah 2004); Ruling on Remand Issue, footnote 4, R. 329-330 a copy attached as First Addendum.

³³ *Id.*; see also *Booth v. Booth*, 134 P.3d 1151, 1155 (Utah Ct. App. 2006); Ruling on Remand Issue, footnote 4, R. 329-330 a copy attached as First Addendum.

³⁴ *Faulkner*, 95 P.3d at 274; Ruling on Remand Issue, footnote 4, R. 329-330 a copy attached as First Addendum.

³⁵ Utah R. Civ. P. 64D(j)(1).

The ruling of the District Court was reasoned and proper. Accordingly, the District Court's ruling on remand should be affirmed.

III. SERVICE OF THE WRIT WAS PROPER.

The Utah Court of Appeals previously has held that while Cache Valley argued that service upon the administrative assistant was improper it has conceded that it waived any defense for improper service.³⁶ Additionally, Cache Valley acknowledged before this Court in its first appeal that "once it entered an appearance through its legal counsel it...waived, for purposes of the future proceedings any previous defects in the service of process."³⁷ The Court should affirm the District Court on these bases alone.

In the ruling on remand, the District Court ruled that while Cache Valley argued that service of the writ of garnishment on its administrative assistant was improper, Cache Valley failed to present any evidence to support its argument. Moreover, Cache Valley had not presented any evidence to tie its failure to properly respond to Bud Bailey's garnishment interrogatories to its administrative assistant's alleged improper acceptance of the writ of garnishment's service.³⁸

Cache Valley argues in its brief that service of the writ of garnishment on its administrative assistant was improper; however, Cache Valley wholly failed to present any evidence to support this argument to the District Court. This failure

³⁶ See *Const. Assoc., Inc.*, 198 P.3d at 1018 n.2, a copy attached as Fourth Addendum.

³⁷ See p. 41 of Cache Valleys' first appeal brief.

³⁸ See Ruling on Remand Issue, R.331 a copy attached as First Addendum.

to provide evidence to support its argument comes after multiple opportunities (including leaving open the decision on remand to file additional supplemental briefing and evidence) to provide such to the District Court. In fact the Court noted:

“that it has afforded Cache Valley the opportunity to submit evidence to supports its arguments on multiple occasions, to wit: in the initial proceedings prior to Cache Valley’s appeal; when requiring supplemental briefing on the remand issue; during the January 20, 2010 hearing on the issue; and subsequent to the hearing by leaving the decision to submit additional supplemental evidence open at the hearing. Nevertheless, Cache Valley has simply failed to submit evidence to support its arguments.”³⁹

The District Court reasoned further that in essence, Cache Valley has merely argued that the alleged error on the part of its administrative assistant should not be imputed to Cache Valley. However, this argument had no evidence to support it and ignored the fundamental principle of employment law that an employer will be held responsible for the actions of its employees.⁴⁰ Accordingly, based upon the evidence and arguments presented in this matter, the District Court found that Cache Valley has not provided an adequate justification for its failure to properly respond to Bud Bailey’s garnishment interrogatories.”⁴¹

³⁹ See Ruling on Remand Issue, footnote 6, R.325-333 a copy attached as First Addendum.

⁴⁰ See *e.g.*, *Christensen v. Swenson*, 874 P.2d 135, 127 (Utah 1994) (“Under the doctrine of respondeat superior, employers are vicariously liable for torts committed by employees while acting within the scope of their employment.”).

⁴¹ See Ruling on Remand Issue, R.331 a copy attached as First Addendum.

Rule 64D(e) requires garnishee [Cache Valley] to assert any rights, exemptions, claims or deductions against a debtor. The rule further requires the garnishee [Cache Valley] assert those rights, exemptions, claims or deductions in the answers to garnishment interrogatories within seven business days and under oath or affirmation. Cache Valley timely answered the garnishment interrogatories but failed to assert any rights to indebtedness, exemptions, offset, or deductions against the judgment debtor as required by Utah R. Civ. P. Rule 64D.

Notwithstanding, Cache Valley is deemed to have been properly served with the writ of garnishment when it timely files answers to the garnishment interrogatories and enters an appearance of legal counsel.⁴²

Finally, Cache Valley is a sophisticated banking institution which most certainly deals with garnishments on a regular (if not daily) basis. Cache Valley certainly accepts and responds to garnishments on a frequent enough basis to have in place procedures and safeguards to notify management or legal counsel. The District Court found in relevant part that:

...Garnishments and these kinds of things and liens are things that happen all the time. I mean, it's seems quite incredible to me that they don't understand the legal ramifications of this, and they create something that in the law, I mean, they even have to call it the de-

⁴² See *Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co.*, 1937, 93 Utah 325, 72 P.2d 1048 (The district court which is court of general jurisdiction, had jurisdiction of garnishee bank, which entered appearance by filing answer in garnishment proceeding by irrigation district's judgment creditor, even if writ served on bank was impotent to require answer.)

facto receivership which means it's really not a legal one, it's just one we've created of our own doing.⁴³

There is no relevant issue regarding service of the writ of garnishment because Cache Valley failed to present any evidence to support its arguments. The ruling of the District Court was reasoned and proper. Accordingly, the District Court's ruling on remand should be affirmed.

IV. THE FORM OF THE DISTRICT COURTS RULING ON THE REMAND ISSUE IS PROPER.

Cache Valley's argument regarding compliance with Rule 52 of the Utah Rules of Civil Procedure is nothing more than a red herring. The District Court was very clear in its ruling on the remand issue that there were no disputed facts. The District Court was not required to make findings of fact on the remand issue. The issues on remand were undisputed and set forth clearly in the District Court's original order granting the judgment.⁴⁴ The only issue on remand was what amount Cache Valley should be required to pay for its failure to answer adequately the interrogatory served with the writ.⁴⁵ While Cache Valley made several arguments, the District Court was clear in its ruling that Cache Valley failed to provide any evidence to support those arguments.

Supported by the undisputed facts, the District Court made its conclusion of law that the just amount to assess against Cache Valley for its failure to

⁴³ R. 272 at page 11, lines 6-12.

⁴⁴ See Order, R.234-243.

⁴⁵ See *Colonial Building Supply, LLC v. Const. Assoc., Inc.*, 198 P.3d 1017 (Utah Ct. App. 2008) , a copy attached as Fourth Addendum.

adequately respond to Bud Bailey's garnishment interrogatories was the full amount that it held for Construction Associates at the time Bud Bailey served its writ of garnishment (i.e. \$17,901.94, plus interest and Bud Bailey's reasonable costs and attorneys' fees).⁴⁶

The ruling of the District Court was reasoned and proper. Accordingly, the District Court's ruling on remand should be affirmed.

IV. BUD BAILEY IS ENTITLED TO ITS ATTORNEY FEES AND COSTS AWARDED BY THE DISTRICT COURT AND ON APPEAL.

In the ruling on remand issue, the District Court ruled that Bud Bailey was entitled to its reasonable costs and attorneys' fees for Cache Valley's failure to adequately respond to Bud Bailey's garnishment interrogatories. Bud Bailey is entitled to its attorney fees and costs awarded by the District Court and on appeal because its action arises from Rule 64D of the Utah Rules of Civil Procedure, which provides for an award of fees and costs for Cache Valley's failure to comply with the rule [Rule 64D], the writ and the order of the district court.

Bud Bailey explicitly requests its attorney fees for this appeal. "A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award."⁴⁷ The legal basis for an award of attorney fees to Bud Bailey arises from Rule 64D(j)(2) of the Utah Rules of Civil Procedure and the Order to Show Cause in re Contempt issued by the

⁴⁶ See Utah R. Civ. R. 64(D)(g) & (j); Ruling on Remand, R.332.

⁴⁷ Utah R. App. P. 24(a)(9).

district court.⁴⁸ Specifically, “if a garnishee [Cache Valley] fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to pay such amounts as are just, including the value of the property or the balance of the judgment, which ever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee’s [Cache Valley] failure.”⁴⁹

The assessment of attorney fees and costs against Cache Valley for its failure to comply with Rule 64D is proper and should be affirmed. Also, “[t]he general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.”⁵⁰

Cache Valley attempts to confuse the Court by stating that Bud Bailey’s costs and attorneys’ fees were not related to the Bank’s failure to adequately respond to the garnishment interrogatories yet Cache Valley again fails to provide any evidence to support its argument.

The District Court in issuing its ruling on remand granted Bud Bailey’s reasonable costs and attorney fees and required that those be proven through subsequent affidavit of counsel. In Bud Bailey’s affidavit of counsel its stated that:

The itemized billing statement does not include attorneys’ fees and costs associated with the entire case, but only includes those attorneys’ fees and costs associated with Cache Valley Bank’s failure to adequately respond to Bud Bailey Construction’s

⁴⁸ See Motion for Order to Show Cause in Re Contempt, R. 120-121.

⁴⁹ Utah R. Civ. P. 64D(j)(2)(2006).

⁵⁰ *Brown v. Richards*, 840 P.2d 143, 156 (Utah Ct. App. 1992).

garnishment interrogatories as provided for in the Court's March 8, 2010 Ruling on the Remand Issue.⁵¹

In submitting its cost and fees, Bud Bailey carefully evaluated each fee incurred to determine if it complied with the direction of the District Court. After making this evaluation, Bud Bailey submitted a request for total fees in the amount of \$8,569.70, plus \$93.00 in costs, for a total of \$8,662.70.⁵² Following submitting the affidavit to the District Court Cache Valley submitted is reasoned objection to those fees. Ultimately, the District Court made a determination that Bud Bailey's requested costs and fees should be reduced by only \$162.00. Thereafter, the District Court entered the order granting Bud Bailey \$17,901.94, plus interest and Bud Bailey's reasonable costs and attorneys' fees in the amount of \$8,500.70 as the just amount to assess Cache Valley for its failure to adequately respond to Bud Bailey's garnishment interrogatories.⁵³

The ruling of the District Court was reasoned and proper. Accordingly, the District Court's ruling on remand should be affirmed.

CONCLUSION

The decision of the District Court on remand should be affirmed and Bud Bailey is entitled to its attorney fees and costs awarded by the District Court together with those incurred on this appeal.

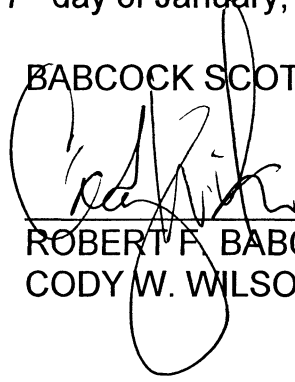
⁵¹ See Affidavit of Attorney Fees and Costs, R.334-340 a copy attached as Third Addendum.

⁵² *Id.*

⁵³ See Order, R.349-352 a copy attached as Second Addendum

RESPECTFULLY SUBMITTED this 7th day of January, 2011.

BABCOCK SCOTT & BABCOCK

A handwritten signature in black ink, appearing to read 'Robert F. Babcock', is written over a horizontal line. The signature is stylized with large, sweeping loops.

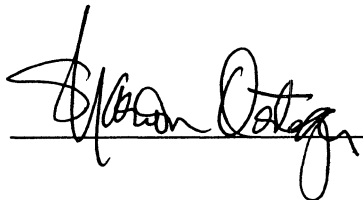
ROBERT F. BABCOCK
CODY W. WILSON

CERTIFICATE OF SERVICE

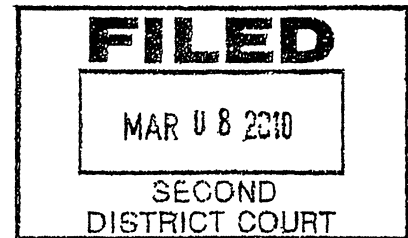
I hereby certify that on this 10 day of January, 2011, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

- U.S. Mail, Postage Prepaid
- ☐ Certified Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Other: _____

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Attorneys for Garnishee/Appellant

BY: 

First Addendum to Appellee Brief



IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

COLONIAL BUILDING SUPPLY, LLC,

Plaintiff,

vs.

CONSTRUCTION ASSOCIATES, INC.,
separately and dba as KRIT DRYWALL;
BUD BAILEY CONSTRUCTION, INC.;
LAYTON POINTE, LC; and JOHN DOES 1
through 10,

Defendants.

RULING ON REMAND ISSUE

Case No. 050700267

Judge Jon M. Memmott

BUD BAILEY CONSTRUCTION, INC.,

Cross-Claim and Third-Party
Plaintiff,

vs.

CONSTRUCTION ASSOCIATES, INC.,
separately and dba as KRIT DRYWALL,
Cross-Claim Defendant; and WILLIAM KIM
PITCHER,

Third-Party Defendant.

CACHE VALLEY BANK, Garnishee.

This matter is before the Court on remand from the Utah Court of Appeals regarding a
determination of the just amount to assess against Garnishee Cache Valley Bank (herein, "Cache

Valley”) for its failure to properly answer the garnishment interrogatories of Cross-Claim and Third-Party Plaintiff Bud Bailey Construction, Inc’ (herein, “Bud Bailey”). The Court has reviewed the Utah Court of Appeals’ opinion, *Colonial Building Supply, LLC v. Const. Assoc., Inc.*, 198 P.3d 1017 (Utah Ct. App. 2008), along with the parties’ supplemental briefing and the Court’s case file. The Court also held a hearing on the matter on January 20, 2010. Having considered all of the arguments, being fully advised as to the premises, and for the reasons set forth herein, the Court rules as follows:

BACKGROUND

On November 1, 2006, and following the Court’s entry of judgment against Third-Party Defendant Construction Associates, Inc. (herein, “Construction Associates”), Bud Bailey served Cache Valley with a writ of garnishment to obtain funds that Cache Valley held on behalf of Construction Associates. At the time, Cache Valley held \$17,901.94 in Construction Associates’ checking account.

Subsequently, Cache Valley responded to the writ and the included interrogatories. However, in its response, Cache Valley left blank the interrogatory section regarding deductions for money owed to it by Construction Associates, thereby creating the impression that Cache Valley was not claiming an offset. Nevertheless, despite its response, Cache Valley applied the \$17,901.94 that it held to the balance of an outstanding Construction Associates loan. Accordingly, Bud Bailey had no notice that Cache Valley had claimed an offset.

Thereafter, on January 29, 2007, Bud Bailey filed a motion for order to show cause regarding Cache Valley’s interrogatory responses and its application of the unidentified offset to the Construction Associates’ loan. On May 9, 2007, following briefing and three (3) separate hearings on the matter, the Court issued an order finding Cache Valley in contempt for its failure

to adequately respond to the garnishment interrogatories in compliance with Rule 64D of the Utah Rules of Civil Procedure. Accordingly, the Court entered judgment in favor of Bud Bailey and against Cache Valley in the amount of \$41,049.11, representing the remaining sum on Bud Bailey's garnishment, \$38,769.71, plus attorneys' fees in the amount of \$2,279.40.

On June 8, 2007, Cache Valley filed a notice of appeal regarding the Court's May 9, 2007 order and the judgment entered against it. On December 4, 2008, the Utah Court of Appeals issued an opinion, which reversed and remanded the matter back to this Court. *See Const. Assoc., Inc.*, 198 P.3d at 1019-20. Specifically, the Court of Appeals found that this Court "erred when it considered the subsequent account activity" of Cache Valley and Construction Associates following the service of Bud Bailey's writ of garnishment. *Id.* at 1019. The Court of Appeals also noted that, "*rule 64D* limits the amount that can be awarded to Bud Bailey to the balance of the amount of property held by [Cache Valley] at the time the Writ was served, \$ 17,901.94, or the amount of the judgment remaining unpaid, \$ 38,769.71, 'whichever is less,' *Utah R. Civ. P. 64D(j)(2)*." *Id.* at 1020 (Emphasis in original). Therefore, the Court of Appeals directed this Court on remand to determine the just amount, within this limitation, that Cache Valley should be assessed for its failure to adequately respond to Bud Bailey's garnishment interrogatories. *Id.* at 1019-20.

Following the issuance of the Court of Appeals' opinion, this Court held a telephone conference with the parties and requested supplemental briefing on the remand issue. On October 28, 2009, Bud Bailey filed its supplemental brief, which relied primarily on the arguments within its pleadings filed prior to Cache Valley's appeal. Bud Bailey also noted that Cache Valley did not dispute that it had failed to properly answer the garnishment interrogatory regarding offsets, and asserted that based upon this failure Bud Bailey was denied the priority of its judgment

against Construction Associates. Accordingly, Bud Bailey argued that the Court should assess a judgment against Cache Valley for the full \$17,901.94 that it held for Construction Associates at the time the writ of garnishment was served, plus reasonable attorneys' fees and costs.

On December 1, 2009, Cache Valley filed its supplemental brief on the remand issue. In its brief, Cache Valley argued that because service of Bud Bailey's writ of garnishment was not upon its registered agent, Cache Valley should not be assessed any amount for its failure to properly respond to the garnishment interrogatories.¹ Cache Valley also argued that because its offset would have been proper but for its incomplete interrogatory response, equity does not favor a finding of contempt on the part of Cache Valley.²

On January 20, 2010, the Court held a hearing on the remand issue. At this hearing, the parties' reasserted their prior arguments and the Court took the matter under advisement.³ Accordingly, the Court finds that briefing on the remand issue is now complete and the matter is now ripe for determination.

ANALYSIS

"Garnishment allows a judgment creditor to satisfy a judgment by reaching property owed to the judgment debtor by a third party." *Whitney v. Faulkner*, 95 P.3d 270, 274 (Utah

¹ Notably, an administrative assistant at Cache Valley received and accepted service of Bud Bailey's writ of garnishment. However, the Utah Court of Appeals found that Cache Valley has conceded that it waived any defense for improper service. *See Const. Assoc., Inc.*, 198 P.3d at 1018 n.2. Nevertheless, the Court of Appeals indicated that this Court could consider the issue of service when determining the just amount to assess against Cache Valley for its failure to adequately respond to the garnishment interrogatories. *See Id.*

² The Court notes that Cache Valley incorrectly argues that the issue of its contempt remains in dispute. Indeed, Cache Valley's supplemental brief incorrectly states that the Utah Court of Appeals found that Cache Valley's offset would have had priority over Bud Bailey's garnishment. However, the Court of Appeals' opinion makes no such finding regarding Cache Valley's priority and acknowledges that Cache Valley did not contest that it failed to assert an offset in response to Bud Bailey's garnishment interrogatories. *See Const. Assoc., Inc.*, 198 P.3d 1017. Accordingly, the Court finds that the issue before it is not whether Cache Valley's actions were contemptuous, as Cache Valley argues, but rather is what is the just amount to assess against Cache Valley for its failure to properly respond to the garnishment interrogatories.

³ Notably, at the January 20, 2010 hearing and after considering the request of Cache Valley, the Court left open the decision to file additional supplemental briefing and evidence to the parties. However, the parties have not filed any such additional supplemental pleadings.

2004). Generally, the garnishee is “a neutral party to the garnishment proceedings, such as a bank, and merely holds the subject property until a court establishes whether the judgment creditor is entitled to it.” *Id.*; *see also Booth v Booth*, 134 P.3d 1151, 1155 (Utah Ct. App. 2006). “However, sometimes a garnishee departs from a neutral position to assert its own claim to the property, which *may* be proper.” *Faulkner*, 95 P.3d at 274 (Emphasis added). Indeed, “[a] garnishee who acts in accordance with [Rule 64D of the Utah Rules of Civil Procedure], the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.” Utah R. Civ. P. 64D(j)(1).

Nevertheless, the Utah Supreme Court has recognized that, “[a]lthough rule 64D is designed to facilitate collection and should not be used to place undue burdens or risks on garnishees, a trial court has the discretion to award [penalties] when a garnishee becomes unduly partisan, or otherwise obstructs the process.” *Faulkner*, 95 P.3d at 275 (discussing the assessment of prejudgment interest to a garnishee who has acted improperly under Rule 64D). Moreover, “[a] garnishee’s improper conduct, including its collusive support of either the judgment creditor or judgment debtor’s position, may lead a trial court to assess [penalties] against it.” *Id.* Accordingly, pursuant to rule 64D of the Utah Rules of Civil Procedure:

“If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee’s failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee’s liability in whole or in part.”

Id. at 64D(j)(2). Further, and as pointed out by the Utah Court of Appeals in its remand:

“By the great weight of authority the liability of the garnishee is limited to the property of the defendant in the possession or under the control of the garnishee ... *at the time the writ of garnishment is served. The writ does*

not render the garnishee liable for property coming into his possession after the writ has been served.”

Const. Assoc., Inc., 198 P.3d at 1019 (quoting *Acheson-Harder Co. v. Western Wholesale Notions Co.*, 269 P. 1032, 1034 (Utah 1928)) (Emphasis in original).

Here, it is undisputed that Cache Valley held \$17,901.94 in a checking account for Construction Associates at the time Bud Bailey served its writ of garnishment. It is also undisputed that Cache Valley failed to properly respond to Bud Bailey’s garnishment interrogatories by leaving blank the interrogatory section regarding Cache Valley’s offsets for amounts owed to it by Construction Associates, which violates Rule 64D of the Utah Rules of Civil Procedure. In its May 9, 2009 order finding Cache Valley in contempt for this failure, this Court entered judgment against Cache Valley in an amount that exceeded that which is authorized by Rule 64D and Utah appellate precedent. *See* Utah R. Civ. P. 64D(j)(i); *see also Const. Assoc., Inc.*, 198 P.3d at 1019-20; *Acheson-Harder Co. v. Western Wholesale Notions Co.*, 269 P. at 1034. Accordingly, the Utah Court of Appeals remanded this matter back to this Court to determine the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey’s garnishment interrogatories, not to exceed \$17,901.94, plus reasonable costs and attorneys’ fees.⁴

⁴ The Utah Court of Appeals also found that in issuing its ruling on Cache Valley’s contempt this Court improperly considered subsequent deposits and withdrawals on Construction Associates’ checking account with Cache Valley, and of which Cache Valley had no legal duty to hold pursuant to Bud Bailey’s writ of garnishment. *See Const. Assoc., Inc.*, 198 P.3d at 1019-20. This Court acknowledges that it made findings within its May 9, 2009 order that pertained to account activities subsequent to the service of Bud Bailey’s writ of garnishment on Cache Valley. However, as a clarifying note, the Court asserts that in finding Cache Valley in contempt it did not rely upon these subsequent account activities nor were the subsequent account activities a determining factor in the amount assessed in the judgment entered against Cache Valley. Rather, this Court based its finding of contempt on the fact that Cache Valley had failed to properly respond to Bud Bailey’s garnishment interrogatories in conformance with Rule 64D of the Utah Rules of Civil Procedure and, therefore, did not provide notice to Bud Bailey of its claimed offsets against Construction Associates. Cache Valley failed to provide an adequate justification for its incomplete interrogatory response and, accordingly, this Court determined that it was appropriate and just under the circumstances to assess against Cache Valley the full amount that it believed was authorized by law, i.e. the remaining balance on Bud Bailey’s garnishment plus attorneys’ fees. This Court’s findings regarding the subsequent account activities were

On remand, Cache Valley has again failed to provide any adequate justification for its failure to properly respond to Bud Bailey's garnishment interrogatory regarding its offsets. While Cache Valley argues that service of the writ of garnishment on its administrative assistant was improper, Cache Valley has not presented any evidence to support its argument.⁵ Moreover, Cache Valley has not presented any evidence to tie its failure to properly respond to Bud Bailey's garnishment interrogatories to its administrative assistant's alleged improper acceptance of the writ of garnishment's service⁶

In essence, Cache Valley has merely argued that the alleged error on the part of its administrative assistant should not be imputed to Cache Valley. However, this argument ignores the fundamental principle of employment law that an employer will be held responsible for the actions of its employees. *See e.g. Christensen v Swenson*, 874 P.2d 125, 127 (Utah 1994) ("Under the doctrine of respondeat superior, employers are vicariously liable for torts committed by employees while acting within the scope of their employment.").⁷ Accordingly, based upon the evidence and arguments presented in this matter, the Court finds that Cache Valley has not provided an adequate justification for its failure to properly respond to Bud Bailey's garnishment

made merely to further illustrate the impropriety of Cache Valley's actions with regard to Construction Associates' checking account and to support the Court's determination that the just amount to assess against Cache Valley is the most severe penalty authorized under Utah law. Accordingly, this Court would have reached the same conclusions and result made in its May 9, 2009 order regardless of its findings on the subsequent account activities that the Utah Court of Appeals has deemed improper. *See Const. Assoc., Inc.*, 198 P.3d at 1019-20

⁵ The Utah Court of Appeals has held that, "a private process server's return of service certifying that a defendant was personally served is presumptively correct and can be disproved only by clear and convincing evidence." *Kenny v Rich*, 186 P.3d 989, 1000 (Utah Ct. App. 2008) (Internal quotations omitted)

⁶ The Court notes that it has afforded Cache Valley the opportunity to submit evidence to support of its arguments on multiple occasions, to wit: in the initial proceedings prior to Cache Valley's appeal, when requiring supplemental briefing on the remand issue, during the January 20, 2010 hearing on the issue, and subsequent to the hearing by leaving the decision to submit additional supplemental evidence open at the hearing. Nevertheless, Cache Valley has simply failed to submit evidence to support its arguments.

⁷ "[A]cts falling within the scope of employment are 'those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, or carrying out the objectives of employment.'" *Swenson*, 874 P.2d at 127 (quoting *Birkner v Salt Lake County*, 771 P.2d 1053, 1056 (Utah 1989))

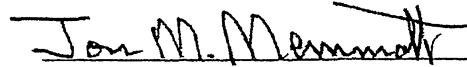
interrogatories. Bud Bailey was not provided notice of the offset claimed by Cache Valley as required by Rule 64D of the Utah Rules of Civil Procedure⁸ and, therefore, the Court finds that the just amount to assess against Cache Valley for its failure is the full amount that it held for Construction Associates at the time Bud Bailey served its writ of garnishment, i.e. \$17,901.94, plus Bud Bailey's reasonable attorneys' fees and costs. See Utah R. Civ. P. 64D(j)(i).

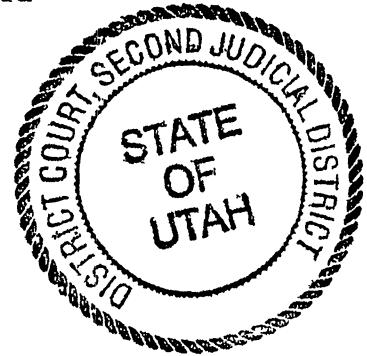
CONCLUSION

Based on the foregoing and the directives on remand from the Utah Court of Appeals, the Court finds that the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey's garnishment interrogatories is the full amount that Cache Valley held for Construction Associates at the time the writ of garnishment was served, \$17,901.94, plus Bud Bailey's reasonable costs and attorneys' fees, which shall be proven through subsequent affidavit of counsel.

The Court directs Bud Bailey to prepare and submit an order that is consistent with and reflects this Ruling.

Date signed: 3/8/10.


DISTRICT COURT JUDGE
JON M. MEMMOTT



⁸ See *Const. Assoc., Inc.*, 198 P.3d at 1018; see also Utah R. Civ. P. 64D(g)&(j).

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing RULING ON REMAND
ISSUE postage pre-paid, to the following on this date: 3/8/10.

N. George Daines
DAINES & WYATT.
108 North Main Street, Suite 200
Logan, Utah 84321

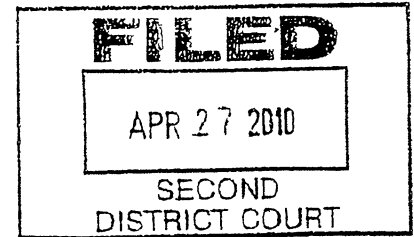
Robert F. Babcock
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Washington Federal Plaza
505 East 200 South, Suite 300
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AL P. M.

Second Addendum to Appellee Brief

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Attorneys for Bud Bailey Construction, Inc



IN THE SECOND JUDICIAL DISTRICT COURT – FARMINGTON
IN AND FOR DAVIS COUNTY, STATE OF UTAH

COLONIAL BUILDING SUPPLY, LLC,

Plaintiff,

vs

CONSTRUCTION ASSOCIATES, INC
separately and dba as KRT DRYWALL, BUD
BAILEY CONSTRUCTION, INC , LAYTON
POINTE, L C , and JOHN DOES 1 through
10,

Defendants

BUD BAILEY CONSTRUCTION, INC ,

Cross-Claim and
Third-Party Plaintiff,

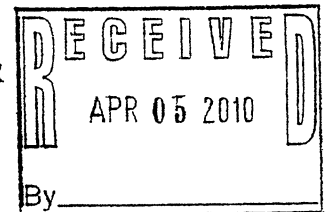
vs

CONSTRUCTION ASSOCIATES, INC
separately and dba as KRT DRYWALL,
Cross-Claim Defendant, and WILLIAM KIM
PITCHER,

Third-Party Defendant

CACHE VALLEY BANK Garnishee

ORDER



Case No 050700267

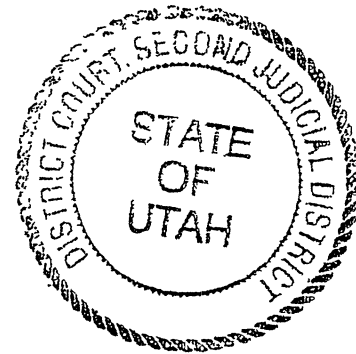
Judge Jon M Memmott

Consistent with the Ruling on the Remand Issue issued by the Court on March 8, 2010, the Court ORDERS, ADJUDGES and DECREES that the just amount to assess against Cache Valley for its failure to adequately respond to Bud Bailey's garnishment interrogatories is the full amount that Cache Valley held for Construction Associates at the time of the writ of garnishment was served, \$17,901.94, plus interest and Bud Bailey's reasonable costs and attorneys' fees in the amount of \$8,500.70, which has been proven through subsequent affidavit of counsel.

DATED this 27th day of April, 2010.

SECOND JUDICIAL COURT

Jon M. Memmott
JUDGE JON M. MEMMOTT

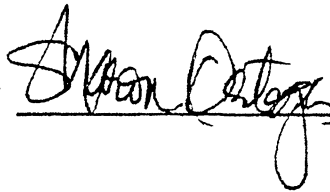


CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2010, a true and correct copy of the foregoing document was served by the method indicated below, to the following

N George Daines
DAINES & WYATT LLP
108 North Main Street
Logan, Utah 84321-4552
Attorney for Cache Valley Bank

- ☒ U S Mail, Postage Prepaid
- ☐ Certified Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Electronic Mail

BY 

MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing ORDER postage pre-paid to
the following on this date 4/27/10

N George Daines
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Cody W Wilson
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AL P. M.

Third Addendum to Appellee Brief

FILE COPY

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Attorneys for Bud Bailey Construction, Inc.

**IN THE SECOND JUDICIAL DISTRICT COURT – FARMINGTON
IN AND FOR DAVIS COUNTY, STATE OF UTAH**

COLONIAL BUILDING SUPPLY, LLC,

Plaintiff,

vs.

CONSTRUCTION ASSOCIATES, INC.
separately and dba as KRT DRYWALL, BUD
BAILEY CONSTRUCTION, INC., LAYTON
POINTE, L.C., and JOHN DOES 1 through
10,

Defendants.

BUD BAILEY CONSTRUCTION, INC.,

Cross-Claim and
Third-Party Plaintiff,

vs.

CONSTRUCTION ASSOCIATES, INC.
separately and dba as KRT DRYWALL,
Cross-Claim Defendant; and WILLIAM KIM
PITCHER,

Third-Party Defendant.

CACHE VALLEY BANK, Garnishee.

**AFFIDAVIT OF ATTORNEY FEES
AND COSTS**

Case No. 050700267

Judge Jon M. Memmott

STATE OF UTAH)
 'ss
COUNTY OF SALT LAKE)

Cody W Wilson, being first duly sworn upon oath deposes and says as follows

1. I am an attorney licensed to practice law within the State of Utah, and I am an associate with the law firm of Babcock Scott & Babcock

2. I am an attorney for Bud Bailey Construction, Inc in the above-entitled matter

3. I am familiar with the prevailing rates charged by attorneys in the community for services rendered similar to those which our firm rendered for Bud Bailey Construction, Inc in connection with the above-captioned matter

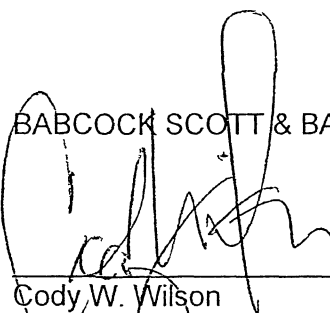
4. Babcock Scott & Babcock has provided legal services on behalf of Bud Bailey Construction, Inc in this matter, as described in the itemized billing statement attached hereto. The itemized billing statement does not include attorneys' fees and costs associated with the entire case, *but only includes those attorneys' fees and costs associated with Cache Valley Bank's failure to adequately respond to Bud Bailey Construction's garnishment interrogatories as provided for in the Court's March 8, 2010 Ruling on the Remand Issue*. The total fees incurred to date are \$8,569.70, plus \$93.00 in costs, for a total of \$8,662.70.

5. The amount of \$8,569.70 is a reasonable attorney fee to be charged in the above-captioned matter to this date considering the type of action, the amount in controversy and all other relevant factors. Bud Bailey Construction, Inc further reserves the right to augment reasonable attorney fees and costs through collection.

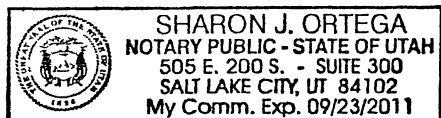
6. Court costs have been incurred in this matter in the amount of \$93.00, as shown below:

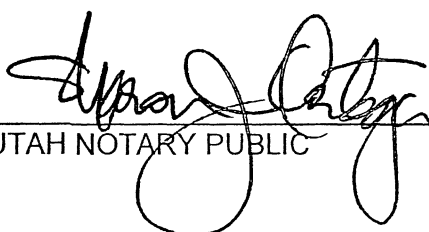
Filing fee for Writ of Garnishment	\$35.00
Garnishee fee	\$10.00
Service fees	\$48.00

DATED this 2nd day of April, 2010.

BABCOCK SCOTT & BABCOCK

Cody W. Wilson

SUBSCRIBED AND SWORN to before me this 2nd day of April, 2010.



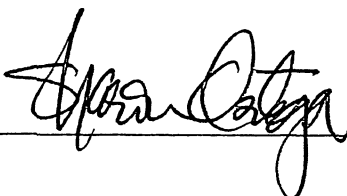

UTAH NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2010, a true and correct copy of the foregoing document was served by the method indicated below, to the following:

- ☒ U.S. Mail, Postage Prepaid
- ☐ Certified Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Other: _____

N. George Daines (USB No. 0803)
DAINES & WYATT LLP
108 North Main Street
Logan, Utah 84321-4552
Attorneys for Cache Valley Bank

BY: 

BABCOCK, SCOTT & BABCOCK
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
801 531-7000 801-531-7060 fax

Bud Bailey Construction
P.O. Box 27848
Salt Lake City, Utah 84127-0848

April 1, 2010

In Reference To: Colonial Building/KRT Drywall
CASE NO. 2807.113

PROFESSIONAL SERVICES:

	<u>Hrs/Rate</u>	<u>Amount</u>
1/22/07 – CW Phone call with collection attorney re: order to show cause on garnishment against Cache Valley Bank Draft Order to Show Cause on Garnishment to Cache Valley Bank on Bud Bailey vs. KRT Drywall Edit & Finalize Order to Show Cause, also include answers to interrogatories as an Exhibit Atty conf with Bob re: Order to Show Cause.	1.00 160.00/hr	\$160.00
1/22/07 – SJO Prepare Motion for Order to Show Cause in Re Contempt and Garnishee Order to Show Cause in Re Contempt.	0.75 65.00/hr	\$ 48.75
2/7/07 – CW Legal research on rights of offset to rights of garnishment on KRT Drywall/ Bud Bailey.	1.00 160.00/hr	\$160.00
2/12/07 – CW Prepare for Order to Show Cause Hearing on Garnishment of Cache Valley Bank for debtor KRT. Travel to Farmington for Court hearing on Garnishment on Cache Valley Bank. Attend Order to Show Cause Hearing.	2.00 160.00/hr	\$320.00
2/14/07 – CW Review fax of UCC documents from Cache Valley Bank. Phone call with George Daines re: Bud Bailey garnishment on Cache Valley Bank Legal research on UCC documents validity.	1.43 160.00/hr	\$228.80
2/16/07 – CW Work on KRT Bud Bailey garnishment issue; Review new documents from atty George Daines on Cache Valley security interest and right to setoff; Atty conf with Bob re: same; review rule 64(d) on garnishments.	1.50 160.00/hr	\$240.00
2/16/07 – RFB Conference(s) with Cody about Cache Valley Banks claim.	0.50 250.00/hr	\$125.00
2/26/07 – CW Read and review Cache Valley response to garnishment and order to show cause. Atty conf with Bob re: arguments and ideas for order to show cause hearing. Legal research on waiver of right to setoff for failure to timely assert and for allowing debtor to continue to draw funds from account after garnishment received. Prepare argument for hearing on order to show cause. Travel to and attend order to show cause hearing (court granted 2.5 hours of atty fees and travel costs for hearing after it continued the hearing for the third time).	5.25 160.00/hr	\$840.00

ms

	<u>Hrs/Rate</u>	<u>Amount</u>
3/5/07 – CW Calculate fees for hearing with Cache Bank garnishment Draft letter to George Daines re invoice for atty fees and costs associated with 2 26 07 hearing on Bud Bailey Cache Valley Bank garnishment	0 50 160 00/hr	\$80 00
3/13/07 – CW Read and review Supplemental Memo in Support of Garnishee's Response to Garnishment and Order to Show Cause - BBCC v Cache Valley Bank Work on Reply to Cache Valley Memo Legal research on the Garnishment of Cache Valley reply	5 54 160 00/hr	\$886 40
3/13/07 – DEM Meeting with CWW, Research UCC Article 9 perfection of deposit accounts	0 83 100 00/hr	\$83 00
3/14/07 – CW Read and review case law on garnishment issues for BBCC and Cache Bank from David Merrell	2 00 160 00/hr	\$320 00
3/14/07 – DEM Research a bank's waiver of its right to offset account funds, Continue researching UCC Article 9	4 30 100 00/hr	\$430 00
3/26/07 – CW Finalize and fax and file Reply Memo in response to Cache Bank	1 50 160 00/hr	\$240 00
3/27/07 – CW Work on response to Cache Bank order to show cause hearing	3.00 160 00/hr	\$480 00
3/30/07 – CW Read and review the Cache Bank statements faxed from counsel, federal tax liens Atty conf with Bob re tax liens, research on effect on bank accounts Phone call with Todd Jensen re liens and Cache Banks position for the next hearing	2 00 160 00/hr	\$320 00
4/2/07 – CW Phone call with George Daines re hearing today and attorney fees for last hearing, provide letter again on fees from last hearing, prepare and review new exhibits from Cache for hearing today Travel to and from office to hearing in Farmington Hearing on Garnishment of Bud Bailey with Cache Bank	3 00 160 00/hr	\$480 00
4/3/07 – CW Work on findings of fact and judgment for Bud Bailey/Cache Bank Work on findings of fact and order for Bud Bailey/Cache Bank	0 38 160 00/hr	\$60 80
4/23/07 – CW Listen to the Third KRT hearing and note the findings of fact and order of the court, Work on drafting findings of fact and order in accordance with the courts findings Atty conf with Bob re same	3 00 160 00/hr	\$480 00
4/23/07 – RFB Review findings of fact, provide comments, Conference(s) with Cody	0 50 250 00/hr	\$125 00
4/25/07 – CW Revise order on Cache Valley Bank from Bob's comments Calculate fees and costs for order and affidavit Draft affidavit of attorney fees associated with the Third Hearing	1 00 160 00/hr	\$160 00
5/14/07 – CW Legal research court docket on KRT drywall order	0 25 160 00/hr	\$40 00
7/18/08 – CW Phone call with George Daines re extention of time to file reply brief and possible settlement figure from Bud Bailey Atty conf with Bob re settlement figure Review fees and costs for case in coming up with a figure Emails with Dave Grubb re settlement for judgment plus fees as first offer	0 65 165 00/hr	\$107 25
7/31/08 – CW Work on calculating fees and costs for Cache Bank offer of settlement	0 50 165 00/hr	\$82 50
8/1/08 – CW Phone call and emails with Bob and Dave Grubb re offer to Cache Bank Draft letter to Cache Bank with offer of settlement	0 55 165 00/hr	\$90 75

	<u>Hrs/Rate</u>	<u>Amount</u>
3/9/09 – SJO File management re Appellant's Brief in Opposition to Petition for Writ of Certiorari	0 33 100 00/hr	\$33 00
7/13/09 – SJO Telephone conference with Terri, Judge Memmott's clerk, re conference call with parties, meeting with Cody Wilson	0 50 100 00/hr	\$50 00
9/15/09 – SJO Case management re Telephone Status Conference	0 33 100 00/hr	\$33 00
9/28/09 – CW Status conf with Judge Memmott re Bud Bailey vs Cache Bank Phone call with George Daines re case and hearing Atty conf with Bob	0 50 185 00/hr	\$92 50
9/28/09 – SJO Meeting with Cody Wilson case management	0 42 100 00/hr	\$42 00
10/26/09 – CW Work on Bud Bailey response to determination to be made on Cache Bank by Judge Memmott	1 57 185 00/hr	\$290 45
10/27/09 – CW Draft position statement of Bud Bailey for determination of judgment by Judge Memmott against Cache Valley Bank	2 00 185 00/hr	\$370 00
10/27/09 – SJO Document management re Bud Bailey's Position Statement Regarding Amount to be Assessed Against Cache Valley Bank for Failure to Answer Garnishment Interrogatory Regarding Offsets	0 33 100 00/hr	\$33 00
12/1/09 – CW Read and review position statement of Cache Bank on remand	1 00 185 00/hr	\$185 00
1/20/10 – CW Review and prepare for hearing Attend oral arguments on remand for Cache Bank Travel to and from office to court	2 50 185 00/hr	\$462 50
3/11/10 – RFB Reviewed favorable decision from judge on KRT matter, Exchanged e-mails with David about process, Conf with Cody	0 50 260 00/hr	\$130 00
4/1/10 – CW Draft Order consistent with the Ruling on Remand Issue Review Affidavit of Attorney Fees and Costs Review Attorney Fees and Costs and designate strictly those items dealing with the Cache Bank issues	1 00 185 00/hr	\$185 00
4/1/10 – SJO Work on Affidavit of Attorney Fees and Costs and Order	0 75	\$75 00
		<hr/>
TOTAL FOR PROFESSIONAL SERVICES RENDERED	54 66	\$8,569 70

COSTS INCURRED

	<u>Qty</u>	<u>Price</u>
10/18/06 Filing fee for Writ of Garnishment	1	\$35 00
10/18/06 Garnishee Fee	1	\$10 00
11/2/06 Service fee KRT Drywall – Writ of Garnishment	1	\$24 00
11/20/06 Postage	1	\$ 2 31
11/20/06 Copies	19	\$ 3 80
1/19/07 Copies	67	\$13 40
2/5/07 Service fee Cache Valley Bank-Garnishee Order to Show Cause	1	\$24 00
2/15/07 Copies	32	\$ 6 40
2/26/07 37 5 Miles roundtrip from Office to Farmington Court for Second Order To Show Cause Hearing (NO CHARGE)	1	\$00 00
3/6/07 Facsimile	3	\$ 3 00
3/6/07 Postage	1	\$ 4 20
3/28/07 Facsimile	5	\$ 5 00
4/10/07 Copies	33	\$ 6 60
4/10/07 Postage	1	\$ 2 37
5/21/07 Facsimile	1	\$ 1 00
7/23/08 Copies	119	\$23 80

9/4/08	Postage	1	\$ 1.26
9/4/08	Facsimile	1	\$ 1.00
			<hr/>

TOTAL FOR COSTS INCURRED:	\$167.14
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Payments Received:

2/26/07 Payment from Daines & Wyatt, Check No. 18904	(\$160.00)
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Total Balance Due	<u>\$8,576.84</u>
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Fourth Addendum to Appellee Brief

DEC 04 2008

This opinion is subject to revision before
publication in the Pacific Reporter

IN THE UTAH COURT OF APPEALS

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08/209.

Colonial Building Supply, LLC,)
)
Plaintiff,)
)
v.)
)
Construction Associates, Inc.,)
separately and dba KRT)
Drywall; Bud Bailey)
Construction, Inc.; Layton)
Pointe, LC; and John Does I-X,)
)
Defendants.)

OPINION
(For Official Publication)
Case No. 20070533-CA

F I L E D
(December 4, 2008)

2008 UT App 436

Bud Bailey Construction, Inc.,)
)
Cross-claimant, Third-)
party Plaintiff, and)
Appellee,)
)
v.)
)
Construction Associates, Inc.)
separately and dba KRT)
Drywall; and William Kim)
Pitcher,)
)
Cross-claim Defendants)
and Third-party)
Defendant,)
)
Cache Valley Bank,)
)
Garnishee and Appellant.)

Second District, Farmington Department, 050700267
The Honorable Jon M. Memmott

Attorneys: N. George Daines, Logan, for Appellant
Robert F. Babcock and Cody W Wilson, Salt Lake City,
for Appellee

Before Judges Bench, Billings, and McHugh.

McHUGH, Judge:

¶1 Cache Valley Bank (Bank) appeals the trial court's Order that Bank pay \$38,769.71, the amount remaining on Bud Bailey Construction, Inc 's (Bud Bailey) judgment against Construction Associates, Inc.¹ We reverse and remand.

BACKGROUND

¶2 On November 1, 2006, Bud Bailey served Bank with a Writ of Garnishment to obtain the funds Bank held on behalf of Construction Associates. An administrative assistant at Bank received service of the Writ.² At that time, Construction Associates had \$17,901.94 in its checking account with Bank.

¶3 Bank responded to the Garnishment and answered the included interrogatories. See generally Utah R. Civ. P. 64D(e) (discussing interrogatories sent to a garnishee). One particular interrogatory stated: "[Bank] may deduct from the amount to be withheld money owed to [Bank] by [Construction Associates], if the amount is not disputed. If you make this deduction, state the amount deducted" Bank left this section blank, thereby leaving the impression that it was not offsetting any amount for debts owed to it. In fact, Construction Associates had outstanding loans with Bank that exceeded \$300,000. Notwithstanding its interrogatory response, Bank applied the \$17,901.94 in Construction Associates's checking account to the balance of one of the outstanding loans.³

¶4 Construction Associates continued to utilize its checking account with Bank, depositing approximately \$45,000 and withdrawing approximately \$44,000, after Bank received the Writ of Garnishment on November 1.⁴ Bud Bailey, who had no notice

1. Bud Bailey had previously obtained a default judgment against Construction Associates in the amount of \$46,919.79

2. Bank argues that service upon the administrative assistant was improper but concedes that it waived any defense for improper service. Accordingly, we do not address the propriety of the service. We note this fact, however, as one that the trial court may consider on remand when determining what amount Bank should be required to pay for its failure to respond adequately to the interrogatories.

3. Bank transferred the money from Construction Associates's account to a bank-controlled suspense account on November 1, 2006, and actually applied it to the outstanding loan sixteen days later.

4. There is some discrepancy between the trial court's findings and the record in this case regarding the amounts deposited and
(continued .)

that Bank had claimed an offset, filed a Motion for Order to Show Cause In Re Contempt on January 23, 2007, which the trial court granted. Several memoranda were filed and three hearings were held as a result of this Order. At the third and final hearing, held April 2, 2007, the trial court expressed concern regarding the deposits and withdrawals to Construction Associates's checking account that occurred after the Writ of Garnishment had been served. Both parties acknowledge that this issue had not been raised in any of the parties' briefs, nor had it been addressed in either of the prior hearings.

¶5 After the third hearing, the trial court verbally entered its ruling, stating,

[Bank was not] in compliance with the garnishment statute as required within Rule 64, because they didn't provide notice within the required time.

. . . .

. . . [Bank] didn't provide the notice that is required under the garnishment statute that there was an offset.

In addition, [Bank] did take an offset it appears of \$17,000. However, [deposited] into that account after the garnishment was a total of [approximately \$45,000]. . . . The evidence that I have before me would indicate that [Bank] allowed [Construction Associates] to continue to write checks and allow those checks to clear the bank to pay third parties while that garnishment was still in place There is nothing . . . that would allow [Bank] to do what they have done in this case to circumvent a valid judgment and a valid garnishment, and therefore, what [Bank] did violated and was in contempt of the order of the Court. And as a result, [Bank] should be ordered to pay the [balance of the judgment].

The trial court's written order likewise was premised upon the trial court's findings that Bank failed to comply with rule 64D by not indicating an offset in its response to the interrogatories and that Bank circumvented a valid Writ of Garnishment by allowing funds to be deposited and then withdrawn after the Writ was served. Bank appeals.

4 (.. continued)

withdrawn However, that discrepancy is immaterial for the purposes of this appeal.

ISSUE AND STANDARD OF REVIEW

¶6 Bank's primary argument on appeal is that the trial court "erred in extending the scope of [the] [W]rit of [G]arnishment to subsequent . . . deposits made" to Construction Associates's account with Bank.⁵ We review this issue for correctness. See Madsen v. Washington Mut. Bank FSB, 2008 UT 69, ¶ 19, 613 Utah Adv. Rep. 29 ("We review questions of law for correctness, giving no deference to the ruling of the court below."); Brown v. Glover, 2000 UT 89, ¶ 15, 16 P 3d 540 ("[T]he interpretation of a rule of procedure is a question of law that we review for correctness.").

ANALYSIS

¶7 If a garnishee fails to comply with the requirements of rule 64D or a writ of garnishment, the trial court "may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property [held by the garnishee] or the balance of the judgment, whichever is less, and reasonable costs and attorney fees." Utah R. Civ. P. 64D(j)(2). In this case, the trial court found that Bank failed to comply with rule 64D and the Writ of Garnishment by not asserting an offset in response to the interrogatories and by allowing Construction Associates to draw from funds deposited after the Writ was served. Bank does not contest that it failed to assert an offset in response to the interrogatories but argues the court erred when it considered the subsequent account activity. We agree.⁶

¶8 By the great weight of authority the liability of the garnishee is limited to the property of the defendant in the possession or under the control of the garnishee . . . at the time the writ of garnishment is served. The writ does not render the garnishee liable for property coming into his possession . . . after the writ has been served.

Acheson-Harder Co. v. Western Wholesale Notions Co., 72 Utah 323, 269 P. 1032, 1034 (1928) (emphasis added); accord 6 Am. Jur. 2d Attachment and Garnishment § 488 (2008) ("[A] writ of garnishment

5 We requested supplemental briefing on Bank's assertion of this claim before the trial court. Bank's supplemental memorandum and the parties' statements during oral argument convince us that the issue is properly preserved for appeal.

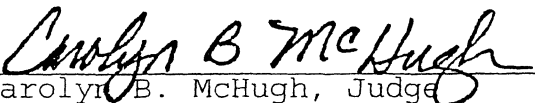
6 Because we resolve Bank's argument on this basis, we need not address its argument regarding the Uniform Commercial Code.

covers only the property or money of a debtor in the hands of the garnishee . . . at the time of the service of the writ, and nothing beyond that."). But see Utah R. Civ. P. 64D(1) (allowing for a writ of continuing garnishment).⁷ Indeed, Bud Bailey conceded during oral argument that under Utah law, the Writ of Garnishment only had effect with regard to the funds that were held by Bank at the time the Writ was served.

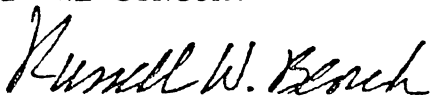
¶9 Because Bud Bailey concedes that the trial court could not consider the subsequent account activity and because Bank does not contest that it failed to properly respond to the Garnishment interrogatory, we reverse the trial court's November 1, 2006 ruling, including the award of attorney fees, and remand for further consideration. On remand, the trial court is free to require Bank to pay an amount that is just, pursuant to rule 64D, for its failure to answer adequately the interrogatory. However, the court should not consider the subsequent deposits and withdrawals when rendering its decision because Bank had no legal duty to hold those funds pursuant to the Writ. We also note that rule 64D limits the amount that can be awarded to Bud Bailey to the balance of the amount of property held by Bank at the time the Writ was served, \$17,901.94, or the amount of the judgment remaining unpaid, \$38,769.71, "whichever is less," Utah R. Civ. P. 64D(j)(2). Consequently, the amount assessed against Bank for its failure to answer the interrogatory regarding offsets correctly should not exceed \$17,901.94, plus "reasonable costs and attorney fees" if the court determines they are appropriate, see id.

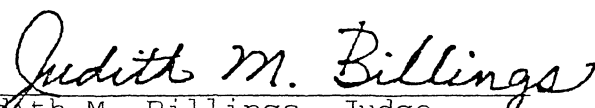
CONCLUSION

¶10 We reverse and remand for a determination of what amount, if any, Bank should be required to pay solely for its failure to answer adequately the interrogatory served with the Writ.


Carolyn B. McHugh, Judge

¶11 WE CONCUR:


Russell W. Bench, Judge


Judith M. Billings, Judge

7. The parties agree that the Writ filed here was not a continuing writ.

CERTIFICATE OF MAILING


I hereby certify that on the 4th day of December, 2008, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

N. GEORGE DAINES
CACHE COUNTY ATTORNEY'S OFFICE
199 N MAIN ST #3
LOGAN UT 84321-4525

ROBERT F. BABCOCK
CODY W. WILSON
BABCOCK SCOTT & BABCOCK
505 E 200 S STE 300
SALT LAKE CITY UT 84102

HONORABLE JON M. MEMMOTT
SECOND DISTRICT, FARMINGTON
PO BOX 769
800 W STATE ST
FARMINGTON UT 84025

SECOND DISTRICT, FARMINGTON
ATTN: BRIDGET GOODMAN / ALYSON BROWN
PO BOX 769
800 W STATE ST
FARMINGTON UT 84025


Judicial Secretary

TRIAL COURT: SECOND DISTRICT, FARMINGTON, 050700267
APPEALS CASE NO.: 20070533-CA